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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

Brenda R. Babb.....Petitioner

v.

The Estate of Charles L. Watson and Eleanor G. Watson and Pamela Watson Fehlig, as Personal Representatives of the Estate of Charles L. Watson and CLW Investments, Inc., d/b/a Salt Marsh Cove, and Wilbur N. McLamb, Individually.....Respondent(s)

On Petition for a Writ of Certiorari
To The Court of Appeals of the State of South Carolina

# PETITION FOR WRIT OF CERTIORARI

Brenda R. Babb
Appearing Pro se
Post Office Box 4800
Calabash, North Carolina 28467
(843)249-3700

## QUESTION PRESENTED

(1) DID THE SUPREME COURT OF SOUTH CAROLINA ERR IN AFFIRMING THE THE ORDER OF THE SOUTH CAROLINA COURT OF APPEALS WHEN THE ORDER OF THE COURT OF APPEALS VIOLATED AMENDMENT XIV, SECTION 1 OF THE UNITED STATES CONSTITUTION?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## TABLE OF AUTHORITIES

Federal Rule U.S.C. Section 1257(a)

United States Constitution, Amendment XIV, Section 1

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# PETITION FOR WRIT OF CERTIORARI

Brenda R. Babb
Appearing Pro se
Post Office Box 4800
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Brenda R. Babb, the petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court denying Petitioner's Petition for Writ of Certiorari of the Order of the South Carolina Court of Appeals entered in the above entitled case in an unpublished opinion, No. 2008-UP-247 filed on May 2, 2008. The Supreme Court of South Carolina denied discretionary review on March 5, 2009. A copy of that decision appears as Appendix A. The South Carolina Court of Appeals Opinion appears at Appendix B.

## STATEMENT OF JURISDICTION

The Opinion of the South Carolina Court of Appeals was entered on May 2, 2008. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. Section 1257(a).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution, Amendment XIV, Section 1, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

## STATEMENT OF THE CASE

In this case a three-day bench court was held in the South Carolina Circuit Court, Charleston County on a Declaratory Judgment action to determine whether or not Petitioner was a shareholder in a corporation known as Little River Campground, Inc. The Circuit Court found that plaintiff was not a shareholder in Little River Campground, Inc., notwithstanding evidence of a valid stock certificate issued by the corporation, which had not been recalled or invalidated, corporate documents identifying plaintiff as a shareholder and a written settlement

offer made to the plaintiff as a shareholder in the corporation. Plaintiff appealed the case to the South Carolina Court of Appeals. Further, the Circuit Court ignored the statute of limitations which precluded the defendants from asserting that Plaintiff was not a shareholder. The Court of Appeals affirmed the Circuit Court. Plaintiff petitioned the South Carolina Supreme Court for discretionary review. The Supreme Court denied the petition for discretionary review.

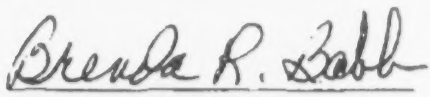
## REASONS FOR GRANTING WRIT

Amendment XIV Section 2 prohibits states from abridging citizens privileges or immunities and rights to due process and equal protection of the law. The courts of South Carolina have denied Plaintiff her right to due process by finding that she was not a shareholder in Little River Campground, Inc., when she held a stock certificate issued on April 26, 1995 by the corporation. The defendants filed their counterclaim for declaratory judgment on January 16, 2004, nine years after Plaintiff's stock certificate had been issued. The South Carolina Circuit Court found that defendants Declaratory Judgment action related back to to the filing of the original complaint on June 24, 1997, therefore the statute of limitations did not apply. The South Carolina Circuit Court found that Plaintiff was not a shareholder in Little River Campground, Inc., in contradiction of the evidence. The South Carolina Court of Appeals affirmed the Circuit Court thereby depriving Plaintiff of her personal property, shares of stock in the corporation.

## CONCLUSION

For the foregoing reasons Petitioner Respectfully prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



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May 26, 2009

# APPENDIX A

The Supreme Court of South Carolina

March 5, 2009

Ms. Brenda R. Babb
P.O. Box 4800
Calabash, NC 28467

Re: Babb, Brenda v. Estate of Charles Watson
2001-CP-10-04469

Dear Ms. Babb:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ
Certiorari Denied.

s/Jean H. Toal C.J.

Justice Costa M. Pleicones
and Justice John W. Kittredge
not participating

March 05, 2009."

By copy of this letter we advising all interested parties of the action of the Court in this matter.

# APPENDIX B

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Brenda R. Babb, Appellant,

v.

The Estate of Charles L. Watson and Eleanor G. Watson and Pamela Watson Fehlig as Personal Representatives of the Estate of Charles L. Watson, and CLW Investments, Inc., d/b/a Salt Marsh Cove, and Wilbur M. McLamb, individually, Little River campground, Inc., and Carl Meares, individually, Respondents.

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Appeal from Charleston County
Daniel F. Peiper, Circuit Court Judge

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Unpublished No. 2008-UP-247
Submitted May 1, 2008 – Filed May 2, 2008

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**AFFIRMED**

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Brenda R. Babb, of Calabash, North Carolina, pro se, Appellant

Stephan V. Futeral, of Mount Pleasant, for Respondents.

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**PER CURIAM:** Brenda R. Babb (Babb) appeals the circuit court's order for the Respondents arguing (1) the statute of limitations expired before their declaratory judgment counterclaim was filed, (2) the counterclaim did not relate back to the date of the original pleadings, and (3) the circuit court erred in ruling on the Respondents' waiver defense because it had been disposed of prior to trial by summary judgment. We affirm.[1]

**FACTS**

At an auction conducted by the United States Marshall Service in June 1991, Babb, Charles Watson, and Carl Meares submitted a successful bid of $400,000 for an 8.4 acre parcel of land known as Little Rive campground (the campground) in Horry County, South Carolina. Babb, Watson and Meares each paid $25,000 earnest money to hold their interest, leaving a balance of $375,000. The parties agreed to form a corporation in which the Campground would be the corporation's asset. Babb, Watson and Meares would be shareholders with a one-third interest in the corporation. In

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

August, 1991, the parties filed articles of incorporation for Little River Campground Incorporated (LRCI). Babb's husband, Mac Babb, was appointed president and Watson Secretary and Treasurer. In April 1995, Watson issued three stock certificates, one to each party, and mailed them to Mac Babb for his signature as president. Babb is in possession of her stock certificate though the parties contest whether the certificates were ever satisfactorily signed and delivered before closing.

Due to environmental cleanup efforts, the sale of the property was not closed until December 6, 1995, at which time Babb, Watson and Meares each paid $125,000. Prior to closing, however, Babb instructed the closing attorney, John Martini (martini), to deed to her a one-third undivided interest in the 8.4 acres. It is undisputed that upon closing, LRCI was deeded a two-third undivided interest in the property and Babb was deeded an undivided interest in one-third.

Babb contended that she was aware that 4.2 acres of land adjacent to the Campground was available for purchase. In amended pleadings, she stated the parties discussed forming a new corporation in which to title this new acreage and any subsequently acquired real property. The parties concede the acreage was purchased and titled to CLW Investments, a real estate investment company operated by respondents Watson and McLamb.

On June 24, 1997, Babb commenced a derivative suit against Watson, and McLamb concerning the

purchase.[2] Respondents answered with general denials. Babb filed an amended complaint on August 10, 1998, naming as plaintiffs, LRCI: Mac Babb, as an officer and director of LRCI: and herself individually and as a shareholder. The case was stricken from the roster pursuant to Rule 40(j), SCRCP, but restored by motion in May 1999. Respondents filed an amended answer in April 2001. This answer provided in part:

> 2. To the extent that Plaintiff's Complain infers that Plaintiff Brenda Babb is shareholder in Little River Campground, Inc., such allegation is denied and strict proof is demanded thereof.

In addition to general admissions and denials, the answer asserted no agreement was reached concerning the purchase of the adjacent property. It asserted the defenses of unclean hands, waiver by Babb of any legal or equitable interest in LRCI, and laches. The answer additionally requested a 12(b)(6) dismissal. Pursuant to Respondents' motion, LRCI and Mac Babb were dismissed from the case on may 25, 2001.

In June 2001, Respondents filed and served an amended answer that included a counterclaim for slander of title. A reply to the amended answer and counterclaim was filed July 26, 2001. Regarding the counterclaim, Babb claimed Respondents failed to

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[2] Charles Watson died in 1998 and this litigation has proceeded with the Estate of Charles L. Watson in his place.

bring the counterclaim within the applicable statute of limitations, and asserted the additional defenses of laches.

Respondents moved to transfer the suit to the non-jury roster and requested that any equitable shareholder's claim be resolved prior to a jury trial on any remaining issues. The order was granted with the circuit court finding:

1. The gravamen of Plaintiff's complaint is a shareholder's derivative suit filed on behalf of little River campground, Inc. against Defendants alleging they usurped a corporate opportunity....

2. That many, if not all, of the other claims asserted by Plaintiffs have, as a basis, a claim that Defendants were alleged required to acquire land on behalf of Little River Campground, Inc. and that Defendants usurped a corporate opportunity.

On July 26, 2002, Babb filed an amended reply to Respondents' second amended answer and counterclaim. In addition to a general denial, Babb reiterated the statute of limitations defense and laches.

The circuit court in Charleston County, on June 18, 2003, addressed several motions filed by the parties. Relevant to this appeal, Babb's motion to amend and dismiss her claims as a shareholder in LRCI was granted.

Babb moved for summary judgment on Respondents' slander of title counterclaim and the defenses of unclean hands and waiver. By an order

filed December 29, 2003, summary judgment was granted to Babb on the slander of title counterclaim. The circuit court acknowledged Babb's claims as a shareholder had been dismissed at her request. The court stated:

> Because her damage claims as a shareholder have been dismissed, defendant's affirmative defenses *as to those claims* should likewise be dismissed. Therefore, plaintiff is hereby granted summary judgment on defendants' defense of unclean hands and waiver.

(emphasis added).

Respondents moved for a third amended answer and counterclaim in December 2003. The answer added LRCI and Carl Meares as parties. It repeated the same general admissions and denials contained in previous answers. Pertinent to this appeal, as a defense and by way of counterclaim, Respondents raised a declaratory judgment action. In support, Respondents contend they are entitled to a court order declaring Babb (1) waived any legal or equitable interest in LRCI by request and receipt of an undivided interest; (2) is barred from claiming interest by the unclean hands doctrine; and (3) is not a shareholder in LRCI.

The circuit court granted Respondents' motion to amend the answer and counterclaim and add parties on January 5, 2004. The order stated:

> [I]t appears that the matters which Defendants seek to raise by amendment are matters which have been litigated by these parties for the past several

years this action has been pending. Under these circumstances, Plaintiff is not prejudiced by such amendment.

Babb filed her reply to the third amended answer and counterclaim on March 4, 2004. In June 2004, the declaratory action was heard at a bench trial. The sole issue was whether Babb was a shareholder in LRCI. The circuit court ruled in favor of Respondents.

## DISCUSSION

Babb argues the circuit court erred by (1) hearing Respondents' counterclaim because the statute of limitations had expired: (2) finding the counterclaim related back to the date of the original pleadings; and (3) ruling on Respondents' waiver defense because it had previously been dismissed by summary judgment. We disagree.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct.

Hedgepath v. AT&T, 348 S.C. 340, 355-56, 559 S.E.2d 327, 336 (2201) (quoting Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on

notice that some right of his has been invaded or that some claim against another party might exist." Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (1994). The fact that an injured party may not comprehend the full extent of the damage is immaterial. Dean v. Ruscon, 321 S.C. 360, 468 S.E.2d 645 (1996). In State ex rel. Condon v. City of Columbia, 339 S.C. 8, 19, 528 S.E.2d 408, 414 (2000), our Supreme Court instructed:

Statute of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of statute of limitations is to relieve the courts the burden of stale claims when a plaintiff has slept on his rights. Another purpose ... is to protect potential defendants from protracted fear of litigation.

Here, Babb asserts the statute of limitations began to run with the December 6, 1995 closing of the Campground. She contends Respondents knew or should have known she claimed a one-third interest in both LRCI and the Campground. According to Babb, Respondents' declaratory judgment action was barred on December 5, 1998. Respondents filed the action January 16, 2004.

Respondents argue the counterclaim for declaratory judgment relates back to Babb's initial lawsuit pursuant to Rule 15 (c), SCRCP. Rule 15 provides in pertinent part:

(c) Relation Back of Amendments. Whenever the claim or defense asserted arose out of the conduct, transaction or occurrence set forth or

attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

"The central requirement here is that the party defending against the new claim have sufficient notice of it, *i.e.*, 'the new claim must be logically related' to the *matters originally pleaded* so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.'" Whitefiled Constr. Co. v. Bank of Tokoyo Trust Co., 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (quoting James F. Flanagan, South Carolina Civil Procedure 127 (2dd. 1996)) (emphasis in original).

In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back.

Id. (citing James Wm. Moore, Moore's Federal Practice §15.19[2] (Daniel R. Coquillete et al eds., 3d 1999)).

In Whitfield, the defendant bank asserted a counterclaim for abuse of process after the statute of limitations had run. This court instructed, "[t]he proper inquiry... is whether [the defendant] had ever provided notice in any of its prior pleadings that it intended to allege such a counterclaim, not whether

Whitfield should have anticipated that the counterclaim would follow as a result of his own actions." Id. The defendant's first responsive pleading presented only general denials and certain defenses. A first amended counterclaim added an unjust enrichment counterclaim and prayed for a set-off, but it was otherwise similar to the original answer. Neither pleading suggest that plaintiff made improper use of process, and "[w]ithout any indication in its prior responsive pleadings that Whitfield was to defend against such an allegation, we fail to see how [the defendant] had set forth, or even attempted to set forth, the conduct, transaction, or occurrence giving rise to a counterclaim for abuse of process." Id. At 224, 525 S.E2d at 897. The court noted the lack of any serious dispute that the defendant knew or should have known it had an abuse of process counterclaim when the complaint was filed. Id. At 224, 525 S.E.2d at 898. "The question of whether the amendment resulted in actual prejudice to Whitfield is not a factor in determining whether the counterclaim is barred by the statute of limitations." Id. At 224-25, 525 S.E.2d at 898. Accordingly, the counterclaim did not relate back.

Here, the circuit court inquired whether Respondents ever gave notice in prior pleadings of an intention to allege a counterclaim for a declaratory judgment that Babb was not a shareholder in LRCI. He determined the first answer filed July 16, 1997, included general denials and certain defenses. But after Babb first asserted she was a shareholder in her amended complaint filed August 10, 1998, Respondents' amended answer in reply specifically denied Babb was a shareholder in

LRCI. The circuit court judge found "[u]nlike Whitfield, the defendants in the instant case indicated in their prior response pleadings that the plaintiff was to defend against the allegation she was not a shareholder of [LRCI]." Accordingly, the circuit judge concluded the declaratory judgment counterclaim, "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the plaintiff had sufficient notice of the claim, and the claim is logically related to the matters originally pled."

The circuit court further noted the issue had been previously decided by an order filed Janaury 4, 2004, by a different circuit court judge. There, Respondents' motion to amend their answer and assert the counterclaim was granted. The judge granting the motion determined, "it appears that the matters which [Respondents] seek to raise by amendment are matters which have been litigated by the parties for the past several years this action has been pending." Importantly, no motion to alter or amend the ruling has been made by either party, nor has there been a request to reconsider. Thus, the judge issuing the declaratory judgment correctly acknowledged he had no right to reconsider the order of another circuit judge. See Dinkins v. Robbins, 203 S.C. 199, 202, 26 S.E.2d 689 (1943) ("the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases where the right to do so has been reserved by the succeeding Judge, when it is allowed by rule or statute, or when the subsequent order does not sufficiently affect the ruling or decision represented by the previous order.")

In their counterclaim, Respondents argued Babb "waived any legal or equitable interest she had in [LRCI], inasmuch as she requested and received an undivided one-third interest in 8.4 acres (2.8 acres) that was to be titled, in its entirety, in the name of [LRCI]." "Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Murdock v. Murdock, 338 S.C. 322, 333, 526 S.E.2d 241, 247 (Ct. App. 1999) (citing Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1994). Waiver may be express or implied by a party's conduct. Parker, 313 S.C. at 487, 443 S.E.2d at 391. Acts inconsistent with the continued assertion of a right may implicate waiver. Provident Life and Acc. Ins. Co. v. Driver, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). "Whether a party is barred by ... waiver can only be determined in light of the circumstances of each case." Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992). Waiver is an affirmative defense and the party asserting it has the burden of proof. Provident Life and Acc. Ins. Co., 317 S.C. at 478, 451 S.E.2d at 928: Frady v. Smith, 247 S.C. 353, 147 S.E.2d 412 (1966). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or all the material facts upon which they depended." Janasik, 307 S.C. at 344, 415 S.E.2d at 387-88.

Babb argues Respondents' use of waiver is an in appropriate offensive use of the doctrine. See Janasik, 307 S.C. at 345, 415 S.E.2d at 388 (waiver is protective only and not to be used as an offensive weapon.). However, the circuit court concluded the Respondents "asserted waiver to protect their

purported investment, to shield [Babb] from claiming an interest in which they do not concede she has a right." We agree.

Babb brought her shareholder status into contention when she brought a shareholder derivative action. When Babb voluntarily dismissed her claims as a shareholder over Respondents' objection, the record shows Respondents expressed to the court their desire that the order reflect their continued claims that Babb was not a shareholder. Babb contends that because she had dismissed her shareholder claims, Respondents were without a cause of action requiring this defense. However, as a circuit judge stated, Respondents only raised the declaratory judgment action upon the dismissal of her shareholder claims.

"The Uniform Declaratory Judgments Act does not create substantive rights or duties; rather it authorizes an action to establish a party's entitlement to a pre-existing right." Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct.App.2000); see also Noisette v. Ismail, 299 S.C. 243, 247 n. 1, 384 S.E.2d 310, 312 n. 1 (Ct. App. 1989), rev'd in part by 304 S.C. 56, 403 S.E.2d 122 (1991); S.C. Code Ann. § 15-53-10 et. Seq. (2005). Respondents' counterclaim seeking to establish their rights to possess the shares of LRCI was authorized by the Declaratory Judgments Act.

Respondents', however, carried the burden to prove Babb waived her interest in LRCI. The parties agree LRCI was formed solely for the purpose of holding the 8.4 acres of land known as Little River Campground. Articles of incorporation were filed

with the secretary of State in August, 1991. Further, the parties agree Babb was deeded an undivided one-third interest in the campground. A review of the record leads this court to agree with the circuit court that Babb voluntarily and intentionally abandoned or relinquished any right to a one-third interest in LRCI's corporate shares.

According to Meares testimony, at the time of LRCI's formation in 1991, no stock certificates were issued. Between 1991 and 1995, no shareholder agreement existed, and no formal meetings were held to take votes. As of 1991, Meares agreed Babb was a shareholder. Due to contamination issues, it took from 1991 to 1995 to close on the property. Together with Mac Babb and the help of attorneys, Meares worked on the environment cleanup. He was involved with correspondence and phone calls, and attended numerous meeting with Mac Babb. Meares testified that he and mc Babb volunteered their efforts, spent roughly the same time working on the cleanup, and had never had any agreement that the two would be compensated. Further, he said he never had a conversation with Babb indicating she would receive more than a one-third interest in the Campground.

On April 4, 1995, Watson sent to Babb and Mac Babb three promissory notes for $5000 to be executed by each investor, a proposed shareholder agreement, and stock certificates for Babb, Watson, and Meares. Although signed by Watson a secretary of LRCI, to be valid, the certificates required Mac Babb's signature as president. The record indicates on May 17, 1995, Watson sent a revised shareholder agreement to Babb and Mac Babb and again

requested that Mac Babb sign and return the stock certificates. At trial, Jett Fehlig, Watson's son-in-law and current LRCI secretary, and Meares both testified to never having seen any stock certificates bearing both required signatures. Whereas Respondents produced copies of certificates for Mears and Watson bearing only Watson's signature, Babb introduced into evidence an original stock certificate bearing the signatures of Watson and Mac Babb. Citing Ward v. Atlas Construction Company, Inc. 276 S.C. 346, 278 S.E.2d 621 (1981), the circuit court explained in its order mere possession of a stock certificate is not dispositive.

Respondents contend Babb and Mac Babb created the shareholder claim by Mac Babb signing the stock certificate after the closing on the Campground and the death of Watson. Mac Babb stated in his deposition he did not remember the date he signed the certificates, but he knew it was "after April 26th of 1995. At trial, Babb testified she saw Mac Babb sign the stock certificates in Watson's office and believed this happened in early June. However, in her earlier deposition Babb reported she did not know when Watson sent the certificates to Mac Babb, whether they were signed by him as president of LRCI, or if Ma Babb transmitted the certificates to the other shareholders. Babb explained the differing testimony resulted from her reviewing her records and notes some time after being deposed. The circuit court observed "even if she was much better prepared for trial, the trial was in 2004, three years after the deposition and ten years removed from the events in question."

Mears and Fehlig said Babb first produced her stock certificate bearing both signatures during discovery in 2001 or 2002. Both told the court the other stock certificates sent simultaneously to Mac Babb for his signature were never signed and returned. Fehlig further testified at trial that his review of corporate records failed to disclose any agreements concerning Babb's shareholder claim in LRCI. Fehlig found neither corporate records documenting Mac Babb's LRCI activities nor any documents or corporate resolutions professing to "give away" interest in LRCI to Babb. The record indicates no corporate bank account was established. The $5000 promissory notes and a shareholders' agreement were never executed. However, the circuit judge in his order concluded "even if the circumstances surrounding the stock certificates seem suspicious, the defendants have not proven fraud on the part of the plaintiff in the procurement of the signed stock certificate."

In his deposition, Mac Babb was asked:

Q: Do you have any knowledge whether initially the deed for Little River Campground at closing was going to be deeded—the property was going to be deeded solely in the name of [LRCI]?"

A: It was never intended for that to happen.

Q: Never---from what point was it never Intended?

A: Never.

However, the circuit judge's order indicates a letter entered into evidence indicated on October 3, 1995, Mac Babb, as president, received a letter from the General Services Administration asking if Mac Babb to "[p]lease confirm that [Mac Babb] still desire[d] to have the deed identify the grantee as [LRCI]." A second letter from the General Services Administration dated November 2, 1995, asked Mac Babb to again confirm whether he still wanted the deed to identify LRCI as grantee. On November 13, 1995, Brandon sent a letter and a copy of the deed to closing attorney Martini. Brandon indicated the original deed would be "overnighted" to Martini upon receipt of checks.

The record shows Babb entered evidence that on November 14, 1995, she delivered a letter to closing attorney Martini that included a cashier's check for $125,000 representing the purchase of one-third of the campground. Babb further indicated to Martini:

> The deed should identify me as Grantee for my portion of this transaction in the following manner and should be confirmed with the [General Services Administration] prior to closing by your office: Brenda Robinson Babb, a resident of Brunswick County, North Carolina, a One third Undivided Interest[.]

At trial, Meares testified he received a telephone call from Martini before the closing, and then telephoned Mac Babb in response:

> After I received the call from [Martini], I called this ---this was the night before we had to close

> the next day. And if we didn't close, the US Marshal Service had already notified us that we would lose the property and our $25,000 that we had originally put down. An so I got a hold of Mac and asked him why he was all of a sudden at the last minute taking his one-third interest outside the corporation. And he said, well, I don't want to be out-moneyed, and we just don't feel comfortable being in the corporation. He said Brenda doesn't feel comfortable being in the corporation, so she wants to take her one-third interest outside the corporation.

Meares reported there was never any conversation with Mac Babb or Babb discussing Babb's entitlement to more than the one-third interest outside the corporation. As a result, Meares stated his understanding was that he and Watson would be the only shareholders in LRCI. In a subsequent phone call to Martini, Meares told him:

> I told [Martini] that Mac was not going to cooperate so we had no choice but to go ahead and give [Babb] her one-third interest out side the corporation, and I didn't have nay choice but to agree to that or lose the property.

Babb explained at trial that she believed the original agreement between the parties was that "each would participate with a third." She averred her understanding was based on conversations to which she was a party. However, in her deposition she had previously stated, "I don't know what the original understanding was because I wasn't

involved in those negotiations." She then explained in her testimony:

> A. I did not hear what Mr. Meares, Mr. Watson, and Mr. Babb discussed at the auction because I was standing at the other side of the tent. What I am referring to is what I heard at the later meeting.

In September 1995, Babb said it was decided she would receive more out of the investment. Babb testified she never gave up or waived her interest in the shares of LRCI. She explained, had she done so, Mac Babb would not have been compensated for his services as president. However, Babb's counsel argued at trial there was an additional agreement between the shareholders to compensate Mac Babb. Babb told the court that Mac Babb agreed in 1991 to become president on the condition he be compensated based on his performance, which included enhancing the value of the property.

Over his ten years as president, Babb secured the tape from the auction, attended several meetings in Georgia and South Carolina addressing the contamination issue, secured estimates of the dock repair and obtained dock permits, and dealt with various zoning matters. Over the ten year period, Babb estimated Mac Babb "worked close to 3,000 hours a year on this property." The circuit judge in his order considered this approximation "a staggering amount of time that this court calls into question."

Babb contended a compensation agreement was reached in September 1995. On direct examination, Babb was asked:

> Q: All right. Let's go back, and you tell the court how it is that you ended up with a deed of one-third interest of the real estate and a stock certificate representing one-third of the stock.
>
> A: [Mac Babb's] compensation was based on his performance. As a result of his performance, I was given a one-third undivided interest in the property which represented 11 percent from Mr. Watson, 11 percent from Mr. Meares. The reason that I was given a one-third undivided interest is if I was given additional stock I would have controlling interest in the corporation."

While on the stand, the judge asked Babb:

> Q : [I]s it your position, ma'am, you were paid—you were compensated in this manner for services that you husband performed for the corporation?
>
> A: My husband was compensated and my husband gave me the compensation.

In its order, the circuit court noted:

> [Babb] testified that Meares agreed that she would receive one-third (⅓) share of Little River Campground.

In his deposition, Mac Babb said Babb is a shareholder in LRCI, and she additionally holds a one-third undivided interest in the 8.4 acre campground. Respondents' counsel questioned him on this outcome:

> Q: How is it, if you have three shareholders and they all put in approximately the same amount, she comes out with so much more?
>
> A: It happens all the time, sir. It happens all the time, sir. It happens in most people that don't pay the same.
>
> Q: Okay. What exactly---so you're saying---what are you saying? Just out of the goodness of their heart Carl Meares or Mr. Watson just said, Here, take some extra acreage?
>
> A: That may have been what happened.
>
> Q: []I want to know what your personal understanding is as to how that arrangement was reached.
>
> A: I don't know.
>
> Q: Does it seem fair to you, that everybody would put---
>
> A: It seems fair to me.

...

Q: Was there any additional consideration given by [Babb] to get additional acreage such that while every party put in an equal amount of money she got more acreage than they did?

A: It happens all the time.

...

Q: Explain to me how she ended up getting one-third undivided interest when everybody put in the same amount.

A: It happened.

After a thorough review of the record, this court agrees with the order of the circuit court judge. Although Babb was at one time a shareholder in LRCI, Meares' testimony that Babb took an undivided one-third interest in the real property in lieu of any interest in LRCI is a more credible interpretation of the circumstances surrounding the closing on the Campground and production of the deed than that offered by Babb. We find no credible evidence that Babb and Meares agreed she would receive more than a one-third share in the real estate as a means of compensating Mac Babb for his services as president. Indeed, she told the court her husband was compensated and he gave the compensation to her. However, the record indicates that at her deposition, Babb stated she did not know whether Mac Babb ever requested compensation. Mac Babb never mentioned that a compensation agreement was reached or that compensation was received by him and given to

Babb. Rather, when asked whether any additional compensation supported Babb's one-third interest in LRCI, he simply answered "[i] happens all the time."

Despite Babb's argument that any phone call between Meares and Mac Babb was insufficient to establish relinquishment of her rights in LRCI, Mac Babb represented Babb's interest as her agent throughout the venture. "Apparent authority to do an act is created as to a third party by written or spoken words or any conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." R&G Constr., Inc. v. Low Country Regional Transp. Authority, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (citing Frasier v. Palmetto Homes, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent: (2) third party reasonably relied on that representation; (3) the third party detrimentally changed his or her position in reliance on the representation. Id. "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." Id. (citing Mortgage & Acceptance Corp. v. Stewart, 142 S.C. 375, 140 S.E. 804 (1927). Generally, agency is a question of fact and may be implied or inferred and proven circumstantially by the conduct of the purported

agent showing a pretense of authority with the alleged agent's knowledge. Id.

We find Mac Babb was the apparent agent of Babb with the authority to relinquish her interest in LRCI. Mac Babb testified that he "had [] Babb's proxy" in a certain situation, which suggests he was an agent to other matters. Babb testified she was not involved in the original negotiations carried out at the auction and indicated she did not hear Watson, Mac Babb, and Meares conversing. Yet, she became an investor despite her involvement. During this initial discussion concerning the purchase of the campground and formation of LRCI, Babb permitted Mac Babb to represent her interests. From this interaction, Respondents reasonably believed Mac Babb had the authority to negotiate on behalf of Babb. Specifically, Meares negotiated with Mac Babb concerning Babb's relinquishment of her interest in LRCI in lieu of a one-third undivided interest in the real property. He reasonably relied on Mac Babb's assertions in informing closing attorney Martini to deed Babb's interest outside the corporation. Further, Babb ratified Mac Babb's conduct with her letter to Martini instructing, [t]he deed should identify me as Grantee for my portion of this transaction...."

This Court finds the record demonstrates Babb had full knowledge of Mac Babb's actions concerning the relinquishment of her rights in LRCI. Babb ratified Mac Babb's conduct by manifesting her intent to adopt her husband's actions and accepting the benefit. She requested and was deeded an undivided one-third interest in Little River Campground. See Crowley v. Harvey & Batty, P.A., 327 S.C. 68, 488 S.E.2d 737 (CT. App. 1995). The

record clearly demonstrates Babb ratified Mac Babb's actions taken on her behalf and their conduct established an agency relationship.

Through her actions and those of her agent, Mac Babb, this Court affirms the circuit judge's conclusion that Babb voluntarily and intentionally relinquished her right to a one-third interest in LRCI.

Respondents' answer and counterclaim included the equitable defense of unclean hands. The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. First Union National Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998.). Respondents have clearly raised credible issues concerning Babb's claims. However, this Court finds respondents failed to meet their burden of proving Babb acted unfairly in a matter that is the subject of the litigation between the parties sufficient to demonstrate "unclean hands." We decline to apply the doctrine of unclean hands to the instant dispute.

**Conclusion**

Respondents' counterclaim for a declaratory judgment that Babb was not a shareholder of LRCI was determined in the January 4, 2004 circuit court order finding it related back to matters originally pleaded and was not barred by the statute of limitations.

Respondents proved by a preponderance of the evidence that Babb voluntarily and intentionally relinquished her right to a one-third interest in the

shares of LRCI in return for an undivided one0third interest in the 8.4 acres known as Little River Campground. Therefore, the order of the circuit court is

**AFFIRMED.**

**ANDERSON, HUFF AND KITTREDGE, JJ., concur.**

# APPENDIX C

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF |
| ) | COMMON PLEAS |
| BRENDA R. BABB ) | NINTH JUDICIAL CIRCUIT |
| ) | |
| Plaintiff, ) | |
| ) | |
| vs. ) | CIVIL ACTION NO. |
| ) | 01-CP-10-4469 |
| THE ESTATE OF CHARLES L. ) | |
| WATSON, and ELEANOR G. ) | |
| WATSON and PAMELA A. ) | |
| WATSON FEHLIG, as personal ) | FILED |
| representatives of the estate of ) | 2004 JUN 11 PM 10:31 |
| CHARLES L. WATSON, and ) | JULIE J. ARMSTRONG |
| CLW INVESTMENTS, INC., ) | CLERK OF COURT |
| d/b/a SALT MARSH COVE, and ) | |
| WILBUR M. MCLAMB, ) | |
| individually, LITTLE RIVER ) | |
| CAMPGROUND, INC., and ) | |
| CARL MEARES, individually ) | |
| ) | |
| Defendants. ) | |
| ) | |

This matter comes before the court on the defendants' counterclaim for a declaratory judgment on the sole issue of whether the plaintiff is a shareholder in Little River Campground, Inc. For the following reasons, the court finds in favor of the defendants.[1]

## I. Background

On June 20, 1991, at an auction by the United States Marshals Service, the plaintiff, Charles Watson, and Carl Meares successfully bid upon an 8,4 acre parcel of land ("Little River Campground") in Horry County,

[1] At trial, the court questioned the manner in which this case was transferred to Charleston County. However, this court cannot revisit the order of another circuit judge. *Deloitte & Touche, LLP v. Unisys Corporation*, 358 S. C. 179, 594 SE2d 523 (Ct App 2004)

South Carolina, in the amount of $400,000. Shortly thereafter. The plaintiff, Watson and Meares each paid $25,000 as "earnest money" to hold their interest, leaving a balance owed of $375,000. On August 22, 1991, the parties filed articles of incorporation for Little River Campground, Inc., a corporation the parties originally intended to hold the property in three equal shares leaving each a one-third (⅓) shareholder in Little River Campground, Inc.

Prior to closing on the property, the plaintiff was deeded a one-third (⅓) undivided interest in the real property and the remaining two-thirds of the real property in the name of the corporation. The parties closed on Little River Campground on December 5, 1995, at which time the plaintiff, defendant Watson, and defendant Meares each contributed $125,000, one-third (⅓) of the remaining balance of the purchase price.

On June 24, 1997, the plaintiff commenced suit against Watson and defendant Wilbur M. McLamb concerning their purchase of property adjoining Little River Campground and alleged false misrepresentations. Defendant Charles Watson died on January 6, 1998.[2] On August 10, 1998, the plaintiff filed an amended complaint wherein she asserted for the first time that she was a shareholder in Little River Campground, Inc. On or about June 15, 2001, the defendants'[3] filed and served an amended answer and counterclaim in which the defendants first denied that

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[2] At trial, the parties agreed to exclude testimony of any undocumented statements made by Watson pursuant to the Dead Man's Statute, S. C. Code 19-11-20. The parties further agreed that any testimony wherein any witness referred to "we said," "we agreed," "they said," "they agreed," or the like specifically excluded reference to Watson.

[3] Defendant Carl Meares was added as a party by order dated January 5, 2004.

the plaintiff was a shareholder in Little River Campground, Inc. On January 16, 2004, the defendants field an amended answer in which they asserted the instant declaratory judgment action.

## II. Analysis

Statute of Limitations

The plaintiff first moves to dismiss the defendants' counterclaim for a declaratory judgment based on the statute of limitations.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Hedgpath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (2001). The statute runs from the date the injured party either knows or should have known by the "exercise of reasonable diligence" to mean that the injured must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. *Id.* Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Id.* Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. *Sate ex rel. Condon v. City of Columbia*, 339 S.C. 8, 528 S.E.2d 408 (2000). One purpose of the statute of limitations is to relieve the court of the burden of trying stale claims when a plaintiff has slept on his rights. *Id.* Another purpose is to protect potential defendants from protracted fear of litigation. *Id.*

The plaintiff asserts that prior to December 6, 1995, defendant Charles Watson, as secretary of the

corporation, issued the plaintiff one-third (⅓) of the shares in the corporation. The plaintiff argues that the statute of limitations began to run in the instant case on December 6, 1995, when on third of the real property (Little River Campground) was deeded to the plaintiff. The plaintiff asserts that as of December 6, 1995, the defendants knew or should have known that the plaintiff claimed one-third (⅓) interest in both the corporation (Little River Campground, Inc.) and the real property (Little River Campground). Accordingly, the plaintiff contends that the defendants' statute of limitations on their declaratory judgment action expired on December 5, 1998. The defendants' counterclaim for declaratory judgment was filed on January 16, 2004.

The defendants argue that the counterclaim for declaratory judgment relates back under South Carolina Rules of Civil Procedure ("SCRCP") Rule 15(c) to the plaintiff's initial lawsuit. Under Rule 15(c), an amended pleading relates back to the date of the original pleading whenever the claim or defense "arose out of the conduct, transaction, or occurrence" set forth or attempted to be set forth in the original pleading. The central requirement here is that the party defending against the new claim has sufficient notice of it, i.e., "the new claim must be 'logically related' to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired." *Whitfield Construction Co. v. Bank of Tokyo Co.,* 338 S.C. 207, 526 S.E.2d 888 (Ct. App. 1999). In federal practice, the factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading include: (1) whether the party defending against a new claim had notice of it: (2) whether the party seeking to add the new claim had

notice of it; (3) whether unfair surprise to the defending party would result if the amendment were to relate back. *Id.*, citing James Wm. Moore's Federal Practice § 15.19[2] (Daniel R. Coquillette et al eds., 3d ed. 1999).

In *Whitfield, supra,* the South Carolina Court of Appeals held that the proper inquiry in determining if a bank's counterclaim for abuse of process "related back" was whether the defendant bank had ever provided in any of its prior pleadings that it intended to allege a counterclaim for abuse of process, not whether the plaintiff Whitfield should have anticipated that the counterclaim would follow as a result of his own actions. *Whitfield, supra.* In its first responsive pleading, the bank averred only general denials and certain defenses. *Id.* The banks first amended answer and counterclaim added a counterclaim for unjust enrichment and requested a set-off, but was otherwise substantially similar to its earlier pleading. *Id.* The court held that without any indication in its prior responsive pleadings that Whitfield was to defend against such an allegation, the court failed to see how the bank had set forth, or even attempted to set forth, the conduct, transaction, or occurrence giving rise to a counterclaim for abuse of process. *Id.* The court noted that there was no serious dispute that the bank knew or should have known it had a cause of action for abuse of process when the complaint was filed. *Whitfield, supra.* The question of whether the amendment resulted in actual prejudice to the plaintiff is not a factor in determining whether the counterclaim is barred by the statute of limitations. *Id.* Either it is or it isn't. *Id.* Accordingly, the court held that the bank did not assert its counterclaim until after the expiration of the statute of limitations and the counterclaim did not relate back. *Id.*

In the instant case, the proper inquiry is whether the defendants ever provided notice in any of their prior pleadings that they intended to allege a counterclaim for a declaratory judgment that the plaintiff is not a shareholder in Little River campground, Inc., In their first responsive pleading filed July 16, 1997, the defendants averred only general denials and certain defenses. However, the plaintiff first asserted that she was a shareholder in Little River campground, Inc. in her amended complaint filed on August 10, 1998. The defendants filed an amended answer on June 15, 2001, setting forth a specific denial that the plaintiff is a shareholder in Little River Campground, Inc. Therefore, the defendants specifically put the plaintiff on notice that they disputed her assertion that she was a shareholder in Little River Campground, Inc., within three years of her assertion. Unlike the defendant in Whitfield, the defendants in the instant case indicated in their prior responsive pleadings that the plaintiff was to defend against the allegation that she was not a shareholder in Little River campground, Inc.

Based on the foregoing analysis, this court is inclined to conclude that the defendants' counterclaim for a declaratory judgment action determining whether the plaintiff is a shareholder of Little River Campground, Inc., arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the plaintiff had sufficient notice of the claim, and the claim logically related back to the matters originally pleaded. Moreover, a Judge of the Ninth Judicial Circuit has previously decided the matter. In an order filed January 5, 2004, the Honorable Deadra L. Jefferson granted the defendants' motion to amend answer and counterclaim to assert a declaratory judgment action

regarding whether plaintiff is a shareholder in Little River Campground, Inc. Judge Jefferson concluded that "it appears the matters which have been litigated by the parties for the past several years this action has been pending." Thus, Judge Jefferson, essentially decided the issue of whether the counterclaim "relates back" to the matters originally pleaded.[4] No one filed a motion to alter or amend or a request to reconsider Judge Jefferson's order; the undersigned does not have the right to reconsider the order of another circuit judge.

In light of Judge Jefferson's decision and the foregoing analysis, the court finds that although the statute of limitations has arguably run, the counterclaim for a declaratory judgment that the plaintiff is not a shareholder in Little River Campground, Inc., "relates back" to the matters originally pleaded and therefore survives.

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[4] The court's conclusion is given credence by communications of counsel in proceedings before the Honorable A. Victor Rawl on May 29, 2003. At the May 29, 2003, motions hearing, Judge Rawl ruled specifically that nothing precluded the defendants from raising the issue of whether the plaintiff is a shareholder in Little River Campground, Inc., in a counterclaim. See transcript of may 29, 2003, Proceedings pp 9-10. Defense counsel indicated to the court that he wanted an order reflecting that the defendants' claims that the plaintiff was not a shareholder would remain. *Id.* At p. 11. Judge Rawl indicated that counsel for the plaintiff "can't object to that." *Id.* p. 11, lines 21-22. Counsel for the plaintiff responded, "I don't have any objection to that, your Honor." *Id.* at p. 11, lines 23-24. Even if no counterclaim existed at the time of the hearing, the plaintiff was well aware of the defendants' intention that a counterclaim be set forth in an original pleading; thus, there is sufficient evidence in the record to conclude that the counterclaim is 'logically related' to the matters originally pleaded such that the plaintiff is not prejudiced by the new claim asserted.

Waiver

In the defendants' counterclaim, the defendants aver that the plaintiff "waved any legal or equitable interest she had in little River Campground, Inc., inasmuch as she requested and received an undivided interest in the 8.4 acres (2.8 acres). That was to be titles, in its entirety, in the name of Little River Campground, Inc.

Waiver is a voluntary and intentional abandonment of a known right. *Maxwell v. Genz*, 350 S.C. 563, S.E.2d 496 (Ct. App. 2002). Waiver may be expressed or implied from a party's conduct. *Parker v. parker*, 313 S.C. 482, 443 S.E.2d 388 (1984). Where an implied waiver is involved, the distinction between waiver and estoppel is close, and sometimes the doctrines merger into each other with almost the imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver. *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct. App. 1994). Waiver, like estoppel, is an affirmative defense and the burden is own upon the party against whom the waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all of the material facts upon which those rights depended. *Genez, supra.*

The plaintiff claims the defendants' assertion of waiver is their counterclaim for a declaratory judgment that plaintiff was not a shareholder of Little River campground, Inc., is an impermissible "offensive" use of the doctrine of waiver under *Janasik, supra.* The doctrine's operation in all cases should be to making

harmless or making whole the party in whose favor it arises and should not, in any case, be made the instrument of gain or profit. *Id.* While the doctrine of waiver may be invoked as an affirmative defense to counterclaims, it may not be asserted in a complaint as an offensive weapon. *Id.*

The court finds the plaintiff's assertion to be without merit. In the instant case, the *plaintiff*, not the defendants, first brought into question whether the plaintiff was a shareholder in Little River Campground, Inc., through her shareholder derivative action. The plaintiff voluntarily dismissed her shareholder derivative action, over the defendants' objection, in proceedings held before Judge Rawl on May 29, 2003. Defense counsel indicated to Judge Rawl that essential to the disposal of the underlying civil action was the issue of whether the plaintiff is a shareholder of Little River Campground, Inc., an assertion that essentially gave rise to the defendants' amendment to assert the counterclaim for a declaratory judgment. The court finds that the defendants in the instant case are not using the doctrine of waiver as an "offensive" weapon but rather as a defense (through the procedural vehicle of a declaratory judgment) against the plaintiff's assertion that she is a shareholder. The defendants asserted waiver to protect their purported investment, to shield the plaintiff from claiming an interest in which they do not concede she has a right.

The plaintiff's argument focuses on the fact that the issue was raised in a declaratory judgment counterclaim. However, the defendants only raised such issue in a counterclaim upon the plaintiff's dismissal of her shareholder derivative suit. The Declaratory Judgment Act does not create any new or substantive right but merely authorizes an action to establish a right. *Noisette v. Ismail*, 299 S.C. 243, 384

S.E.2d 310 (Ct. App.) 1989) Clearly the Declaratory Judgment Act authorizes defendant's counterclaim to establish the defendants' purported right to possession of the "shares" of Little River Campground, Inc.

Nevertheless, the defendants have the burden of proving that the plaintiff voluntarily and intentionally abandoned or relinquished a right to a one-third (⅓) interest in the corporation. It is undisputed that the parties intended to create Little River Campground, Inc., for the sole purpose of holding the 8.4 acres of real property known as Little River Campground, Inc. The articles of incorporation for Little River Campground, Inc., were filed with the Secretary of State on August 22, 1991. It is also undisputed that the plaintiff received a deed, not recorded until March 25, 1996, for a one-third ((⅓) undivided interest in Little River Campground. Thus, the sole issue for the court to decide is whether the plaintiff voluntarily and intentionally abandoned or relinquished a right, if any, to a one-third interest in the corporate shares of Little River Campground, Inc.

Carl Meares testified at trial in 1991, the time of the formation of Little River Campground, Inc., no stock certificates were issued to anyone with respect Little River Campground, Inc. Mears testified that no stock certificates were issued in 1992, 1993, 1994, or 1995. Mears further testified that Little River Campground, Inc., did not have a shareholder agreement between 1991 and 1995. Meares testified that between 1991 and 1995, no formal meetings were held wherein votes were taken. Meares, however, testified that in 1991, the shareholders of Little River Campground, Inc., were Meares, Charles Watson, and Brenda Babb.

Meares testified that it took from the date of purchase in 1991 until 1995 to close the property

because of gas leaks involving fuel tanks located therein. Such gas leaks resulted in an environmental cleanup process monitored closely by the federal government. Meares testified that he and Malcolm ("Mac") Babb, the husband of the plaintiff and a former party to the underlying lawsuit, agreed to work on the environmental cleanup issues together in conjunction with attorneys from the Wyche law Firm. Meares testified that Mac Babb worked on the environmental cleanup issues but that Meares was unaware of anything that plaintiff did with respect to the environmental cleanup of Little River Campground. Meares testified that he edited letters drafted by Mac Babb, placed various telephone conversations with the United States Marshals Service, and attended several meetings with Babb and other individuals involved in the environmental cleanup of the property. He indicated that he and Mac Babb spent roughly the same amount of time with respect to the clean up issue. Meares testified that both he and Mac Babb volunteered to work on the cleanup issue and never had any agreement whatsoever that Mac Babb or he would be compensated for the services. Meares further testified that he never had a conversation with the plaintiff whereby the plaintiff would receive more than a one-third (⅓) share of Little River Campground.

On April 4, 1996, Watson sent to the plaintiff and her husband three promissory notes in the amount of $5,000 to be executed by each investor, a proposed shareholder agreement, and stock certificates for Watson, Meares, and the plaintiff. Watson, as secretary of Little River Campground, Inc., signed these certificates but Mac Babb's signature was required on each of them to be valid. On May 17, 1995, Watson sent, among other items, a revised shareholder agreement to the plaintiff and Mac Babb and again

requested that Mac Babb sign the stock certificates and that he return them to Watson. Both Jerry Fehlig, Charles Watson's son-in-law and current secretary of Little River Campground, Inc., and Meares testified that they had never seen stock certificates signed by both Charles Watson, as secretary for Little River Campground, Inc., and Mac Babb, as president of Little River campground, Inc. The defendants introduced copies of stock certificates with the names of the plaintiff, Mears, Watson, with only Watson's signature. The introduced into evidence an original stock certificate signed by both Watson and Mac Babb. However, mere possession of a stock certificate is not dispositive. See *Ward v. Atlas Construction Company, Inc*, 276 S.C. 346, 278 S.E.2d 621 (1981)(An individual can be an equitable owner of stock even though he does not possess the certificates).

The defendants assert that the plaintiff and Mac Babb contrived the plaintiff's shareholder claim by Mac Babb signing the stock certificates after the closing on Little River Campground and the death of Charles Watson. Mac Babb testified that he signed the stock certificates after "April the 26th of 1995." Deposition of Mac Babb p.82. At trial, the plaintiff testified that she watched Mac Babb sign each of the stock certificates and was personally aware that Mac Babb delivered those certificates. However, in her deposition, the plaintiff testified that she did not know whether Mac Babb signed the stock certificates as president of Little River Campground, Inc., not whether Mac Babb actually delivered the signed stock certificates to the other shareholders. The plaintiff indicated that the reason the deposition read the way it did was because it had taken in 2001, almost seven years later. However, even if the plaintiff was much better prepared for trial than her deposition, the trial was in

2004, three years after the deposition and ten years from the events in question.

Meares and Fehlig testified that the plaintiff first produced her stock certificate, signed by her husband, during the discovery phase of the underlying case in 2001 or 2002. Both testified that the other stock certificates simultaneously sent to Mac Babb for his signature were never signed and returned. Fehlig testified at trial that upon reviewing the corporate records in his capacity as secretary, he never found any agreements pertaining to the plaintiff's claim for a shareholder interest in Little River Campground, Inc. Fehlig testified that no corporate records documenting Mac Babb's activities with respect to Little River Campground, Inc. Fehlig testified that he saw no documentation or corporate resolution purporting to "give away" interest in the corporation to the plaintiff. The record reflects that the parties never established a corporate bank account, the proposed shareholder agreement was never executed, and the $5,000 promissory notes were never executed. Nevertheless, even if the circumstances surrounding the stock certificates seem suspicious, the defendants have not proven fraud on the part of the plaintiff in the procurement of the signed stock certificate.

Portions of Mac Babb's deposition were designated and read into the record at trial. Mac Babb testified at his deposition that it was never intended for the deed for Little River Campground to be deeded solely in the name of Little River Campground, Inc. Deposition of Mac Babb pp. 86-87. However on October 3, 1995, Mac Babb, as president of Little River campground, Inc., received a letter from James Brandon of the General services Administration wherein Brandon asked Mac Babb to "[p]lease confirm that [Mac Babb] still desire[d] to have the deed identify

the grantee as Little River Campground, Inc. Defendants' Exhibit 20. In a letter dated November 2, 1995, Brandon again asked Mac Babb to confirm that Mac Babb still desired to have the deed identify the grantee as Little River Campground, Inc. Defendants' Exhibit 21. On November 13, 1995, Brandon sent a letter to Martini wherein Brandon enclosed a copy of the deed and indicated that the original deed would be "overnighted" to Martini upon receipt of the checks. Defendants' Exhibit 22.

The record reflects that on November 14, 1995, the plaintiff delivered a letter to closing attorney John L. Martini in which she included a cashiers check amount of 4125,000 representing the purchase of one third of the property identified as Little River Campground. The plaintiff further indicated the following:

> The deed should identify me as Grantee for my portion of this transaction in the following manner and should be confirmed with the [General Services Administration] prior to closing by your office: Brenda Robinson Babb, a resident of Brunswick County, North Carolina, a One Third Undivided Interest[.]

Plaintiff's Exhibit 12.

Mears testified at trial that he received a telephone call from Martini just prior to the closing date. Meares testified that in response to receiving this call. Meares called Mac Babb the night before the closing and asked Babb "why was all of a sudden taking his one third outside the corporation." Meares testified there was never any discussion with Mac Babb or the plaintiff that the plaintiff was entitled to more

than one-third (⅓) interest outside the corporation. Meares testified that Mac Babb indicated to him that he 'didn't want to be 'outmoneyed.'" The plaintiff didn't feel comfortable in the corporation, and the plaintiff intended to take her one-third (⅓) interest outside the corporation and did not indicate that the plaintiff was entitled to anything more. Meares testified that his understanding of Mac Babb's comments was that he and Charles Watson would be the only shareholders in Little River Campground, Inc. Meares testified that in response to his conversation with Mac Babb, he telephoned Martini and informed him that Mac Babb just was not going to corporate and that the parties had no choice but to give the plaintiff her one-third (⅓) interest outside the corporation. The parties closed on the real property known Little River Campground on December 6, 1995.

The plaintiff testified that the original agreement between the parties, based on conversation that she heard, was that each party would participate with a one-third (⅓) interest in the property. However, the plaintiff also testified at trial that she was not involved in the original negotiations that took place at the auction. She indicated that she did not hear what discussions were made between Watson, Mac Babb, and Meares at the time of the auction but was referring to conversations at a later meeting. The plaintiff testified that she never gave up or waived her interest in the shares of Little River campground, Inc. The plaintiff testified that it was September (of 1995) that she decided she should receive more out of her investment.

The plaintiff testified that had she given up her interest in the shares of Little River Campground, Inc., the Mac Babb would not have been compensated for his services as president of the corporation. The plaintiff's

counsel argued at trial that there was an additional agreement between the shareholders to pay Mac Babb's ten years of service as president of Little River Campground, Inc. The plaintiff testified at trial that in 1991 when Mac Babb agreed to become president of Little River Campground, Inc., he did so with the condition that he be compensated for his efforts based on performance. The plaintiff testified that "performance" included Mac Babb's enhancing the value of the property. The plaintiff testified that over his ten-year period as president of Little River Campground, Inc., Mac Babb secured the tape from the auction, went to several meetings in Georgia and South Carolina regarding the contamination of Little River Campground, worked to secure estimates of the dock repair and obtain permits for the dock, and dealt with various zoning issues with respect to the property. The plaintiff estimated that Mac Babb worked close to three thousand (3,000) hours per year on the property, a staggering amount of time that this court calls into question.

The plaintiff testified that Mac Babb's compensation was based upon his performance and as a result of Mac Babb's performance the plaintiff was given a one-third (⅓) interest in the property representing eleven percent (11%) from Meares and eleven (11%) from Watson. The plaintiff indicated that the reason she was given a one-third interest in the acreage was that if she were given additional stock she would have had controlling interest in the corporation.. the plaintiff testified that Meares agreed that she would receive one-third (⅓) of the real estate in addition to her stock. However, the plaintiff testified at trial that she never had a conversation with Meares about any agreement to give her more interest. As indicated previously, Meares testified that he never

had a conversation with the plaintiff whereby the plaintiff would receive more than a one-third (⅓) share of Little River Campground.

Mac Babb indicated in his deposition that the plaintiff is a shareholder in Little River Campground, Inc. Deposition of Mac Babb p.59. Mac Babb further testified at his deposition that the plaintiff received a one-third (⅓) undivided interest in Little River Campground, the 8.4 acres of real property. Deposition of Mac Babb pp. 163-164. However, Babb indicated that it is his contention that the plaintiff received not only one-third (⅓) of the 8.4 acres but also a one-third interest in Little River Campground, Inc. Deposition of Mac Babb p. 165. Counsel for the defendants asked Mac Babb, "how is it , if you have three shareholders and they all put in approximately the same amount, [the plaintiff] comes out with more?" Deposition of Mac Babb p. 165, lines 20-22. Mac Babb responded, "It happens all the time, sir. It happens all the time, sir. It happens in most people that don't pay the same." Deposition of Mc Babb p. 165, lines 23-25. Defense counsel inquired of Mac Babb whether Meares and Watson gave the plaintiff extra acreage in Little River Campground to which Babb replied., "[t]hat may have been what happened." Deposition of Mac Babb p. 166, lines 3-5. Babb testified that he did not have any personal understanding as to how such an arrangement was reached. Deposition of Mac Babb, p. 166, lines 17-21. *When asked whether there was any additional consideration given by the plaintiff to get additional acreage such that while every party put in an equal amount of money, she received more land, Mac Babb again indicated that '[It happens all the time."* Deposition of Mac Babb p. 167, lines 12-16. Mac Babb indicated that the parties agreed upon the plaintiff's receipt of a larger portion of land. Deposition

of Mac Babb p. 167, lines 19-21. When asked again to explain how the plaintiff ended up getting one-third (⅓) undivided interest in Little River Campground when everybody put in the same amount. Mac Babb responded, [i]t happened." Deposition of Mac Babb p. 169, lines 1-4.

The court finds, contrary to the defendants' argument, the plaintiff was at one time a shareholder of Little River Campground, Inc. However, the court finds Meares' testimony regarding the agreement that the plaintiff took a one-third (⅓) undivided interest in the real property, Little River Campground, in lieu of any interest in Little River Campground, Inc., to be a much more credible reflection of the events surrounding the closing on the property and procurement of a deed than that of the plaintiff and Mac Babb. The court does not find credible the testimony that the plaintiff and Meares agreed that the plaintiff would take a one-third (⅓) undivided interest in Little River campground as compensation for Mac Babb's services as president. When asked by the court whether it was her position that she was compensated in the afore mentioned manner for services that her husband performed for the corporation, the plaintiff responded that *her husband* (Mac Babb) was compensated and her husband gave her the compensation. However, at her deposition, the plaintiff testified that she did not know whether Mac Babb ever requested to be compensated for his services as president. Moreover, Mac Babb testified at his deposition, when asked whether there was any additional compensation for the plaintiff receiving a one-third (⅓) undivided interest in Little River Campground, only that "it happens all the time." Mac Babb never mentioned any agreement for *or* receipt of compensation for his services as president of Little

River Campground, Inc., much les whether he gave any purported compensation to the plaintiff.

The plaintiff argues that any telephone call between Carl Meares and Mac Babb the night before closing was insufficient to establish the plaintiff's relinquishment of her one-third (⅓) interest in Little River Campground, Inc. Mac Babb represented the plaintiff's interests throughout the entire venture as an agent for the plaintiff. Apparent authority to do an act is created as to a third person by written or spoken words or by conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. *R&G Const. v. Low Country Regional Transportation Authority*, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). The elements of apparent authority are (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation: and (3) third party detrimentally changed his or her position in reliance on the representation. *Id.* When a principal, by way of such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances. *Id.* Generally, agency is a question of fact. *Id.* Agency may be implied and inferred and may be proven circumstantially by the conduct of the purported agent prohibiting a pretense of authority with the knowledge of the alleged principal. *Id.*

Mac Babb testified in his deposition that he 'had [the plaintiff's] proxy", which at least suggests his status as an agent as to other matters.. Deposition of

Mac Babb p. 102. The plaintiff testified at trial that she was not involved in the negotiations that took place at the auction and indicated that she did not hear what discussions were made between Watson, Meares, Mac Babb, and Meares. Therefore, the initial discussions between the parties about the purchase of Little River Campground and the formation of Little River Campground, Inc., were unbeknownst to the plaintiff, rather, her husband represented her interests and the plaintiff allowed it. Therefore, the defendants reasonably believed that Mac Babb had the authority to negotiate with respect to the plaintiff's interest in Little River Campground. Meares negotiated with Mac Babb concerning the plaintiff's relinquishment of her interest in Little River Campground, Inc., in lieu of a one-third (⅓) undivided interest in Little River Campground and reasonably relied on Mac Babb's assertions in informing Martini to give the plaintiff her interest outside of the corporation. Thus, Mac Babb was an apparent agent of the plaintiff with the authority to relinquish the plaintiff's interest in Little River Campground, Inc.

The plaintiff had no involvement in negotiations at the auction between Mac Babb, Watson and Meares, yet nonetheless became an investor with Watson and Meares with respect to Little River Campground. The credible evidence in the record suggest that Mac Babb and Meares agreed that the plaintiff would take a one-third (⅓) undivided interest in the real property outside the corporation and that the plaintiff ratified such conduct by virtue of her letter indicating how she wished to have the deed identify her as Grantee for her "portion of the transaction" The court finds that the evidence in the record reveals that the plaintiff had full knowledge of her husband's actions regarding her relinquishment of her interest in Little River

Campground, Inc. The plaintiff ratified her husband's acts by manifesting her intent to adopt her husbands actions and accepting the benefits of his acts, i.e., she *requested and received* a deeded one-third (⅓) undivided interest in Little River Campground. See *Crowley v. Harvey & Battey, PA..*, 327 S.C. 68, 488 S.E.2d 334 (1997); *Anthony v. Padmar, Inc.*, 320 S.C. 426, 465 S.E.2d 745 (CT. App.) 1995). Thu, plaintiff ratified the actions of her husband that wee done on her behalf and the conduct of the parties establishes an agency relationship.

Thus, the court finds that the plaintiff, by and through her own actions as well as those of her husband, Mac Babb, voluntarily and intentionally relinquished her right to a one-third (⅓) shareholder interest in Little River campground, Inc.

Unclean Hands

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is subject of the litigation to the prejudice of the defendant. *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1989). Although the defendants presented testimony that undoubtedly raised a question as to the credibility of the plaintiff's claims, the court finds that the defendants have failed to meet their burden of proving that the plaintiff acted unfairly in a matter that is subject of the litigation between the parties that would rise to the level of "unclean hand." Therefore, the court declines to apply the doctrine of unclean hands to the instant dispute.

## III. Conclusion

The court finds that the defendant's counterclaim for a declaratory judgment that the plaintiff is not a shareholder of Little River Campground, Inc., was determined by the Honorable Deadra L. Jefferson to "relate back" to matters originally pleaded and therefore is not barred by the statute of limitations.

The defendants proved by a preponderance of the evidence that the plaintiff voluntarily and intentionally relinquished her right to a one-third interest in the shares [of] Little River Campground, Inc., in return for a one-third undivided interest in the 8.4 acres of real property known as Little River Campground.

The Clerk shall provide notice of filling of this order to all parties in accordance with Rule 77(d).

IT IS SO ORDERED.

s/ Danny Pieper
Danny Pieper, Resident Judge
Ninth Judicial Circuit

June 10, 2004

Charleston, SC

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| Attorney for the Defendant | Stephan V. Futeral, Esq. |
| Court Reporter | Holly Hiott O'Quinn |